1948

File No. O Boroughs 48

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Legal **DEPARTMENT**

"A" **BRANCH**

Subject :—

Opinions under the Bombay Municipal Boroughs Act, 1925.

P-78

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File No. O Boroughs/48

Std. Sectt. Slip 24 B a.

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C ONN T E N T S

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Office of the R.L.A.

Legality of the order passed by the Collector for acquisition of land for the Municipality Bombay Municipal Boroughs Act,1925 sections 215,218 Land Acquisition Act,1894 sections 4,6,48(2)

It appears that, as the Malegaon Municipality refused to acquire Survey No.15 required to be kept open as an air-lung between the old town and the new development area of Malegaon, the Collector of Nasik issued an order under section 215 of the Bombay Municipal Boroughs Act,1925, directing that the land should be acquired on behalf of the Municipality and the cost thereof should be charged to the Municipality. That order of the Collector passed in 1944 was confirmed by the Commissioner who directed it to remain in force permanently. He also submitted to Government a report of the case required by sub-section (3) of section 215 of the Act. Government acquiesced in the proposal to acquire the land with the result that final notifications under section 4 and 6 of the Land Acquisition Act,1894, were issued by the Revenue Department. The Municipality was asked several times to deposit the cost of acquisition amounting to Rs.17,000/- but no steps were taken by the Municipality. The Municipality, has, however, now agreed to pay the cost of acquisition on condition that the total cost should not exceed Rs.17,000/- and that the vacant possession be handed over to the Municipality. It appears that the award determining the possession has no yeat been passed. However, the owner appears to be claiming Rs.50,000/- and if ultimately he is no satisfied with the award, a reference to the Civil Court under section 18 of the Land Acquisition Act will have to be made. In view of the fact that the order passed by the Collector under section 215 of the Bombay Municipal Boroughs Act is of doubtful validity, and as the Municipality is unwilling to pay more than Rs.17,000/- , the Deputy Secretary, Health & Local Government Department is of the view that Government should withdraw from acquisition in which case Government will have to pay the compensation under section 48 of the Land Acquisition Act. Secretary, H.& L.G.D. has requested the R.L.A. to advise on the following points:-

1. Whether the order passed by the Collector of Nasik dated 1-11-1944 is legal.

2. If not whether the Municipality's acquiescence validates it.

The extraordinary powers of the Collector under section 215(1) of the Bombay Municipal Boroughs Act, 1925, have to be invoked only in case s of emergency. " Emergency" is defined by the Oxford Dictionary as " the sudden or unexpected occurrence of a state of things", a juncture that arises or crops up, a sudden occassion". It means an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy.(See R.L.A's opinion No.11023 dated 10-11-1947). The provision of a land to serve as an air-lung between the old town and the new development area of Malegaon could not be considered an emergency measure calling for immediate action or remedy. Consequently the order of the Collector, Nasik, would not be intra vires the provisions of section 215(1).

It is ture that the Municipality has offered to pay Rs.17,000/ as compensation subject to the condition that it would not be liable to pa anything more than Rs.17,000/- even if the compensation determined under the Land Acquisition Act would be in excess of that amount; and such offer would be tantamount to acquiescence in the emergency order passed by the Collector. But no amount of acquiescence in an order which is ab initio illegal and void would validate such order. Government may, therefore, consider whether it would not be safer and more profitable to withdraw from the land acquisition and pay compensation under section 48(2 of the Land Acquisition Act rather than proceed with the land acquisition and incur the risk of having to pay the whole cost of acquisition or at least the excess over Rs.17,000 in case the order is

successfully challenged in a Court of Law.

ID/ .....30/1/.

Remembrancer of Legal Affairs.

U.O.No.1082 dated the 2nd February 1948.

Submitted.

Please see the Collr's order at p.3 ante and the Health & Local Govt. Deptt note at pp.5-6. The facts are these.

Mr. B.A.Jadhav, a Councillor of Lonavala Municipality had stood surety to one municipal employee in the year 1944. This surety bond, it appears, was in force in 1946 when Mr. Jadhavw was elected to the Municipality and therefore a complaint was made to the Collr. on 8-8-47. On 15-10-47 Mr.Jadhav seems to have revoked his bond and on 2nd Jan 1948 when the Collr. decided the case Mr. Jadhavw as no longer disqualified. The Collr, on that date held that as the disability was removed, the disqualification was not operative at the time of passing the order. He accordingly did not declare his seat as vacant. vacant

The question for R.L.A's consideration is whether the Collector's order is correct.

The Collr's order is wrong. Mr.Jadhav was admittedly elected in contravention of S.12(2)(b) and this fact having been proved the Collr. ought to have declared his seat vacant in accordance with the provisions of Sub-sec. (4) of section 12 . This sub-section provides that if any person is elected or nominated as a Councillor in contravention of the provisions of this section his seat shall subject to the provisions of sub-section (5) be deemed to be vacant. The fact that Mr. Jadhav had subsequently revoked his bond is immaterial so far as his disqualification at the date of election is concerned (See R.L.A.'s opinion No. 7778 d/.2-8-1939; and also No.6931 dated 5-7-1939; see also R.L.A.No.8141 d/- 16-9-1940 at column 266 of Supplement V; file O Borough/40 is put up in another case and is not

available.

Id/.....26/2.

A.A.S.

xxxxxxxx xxxxxxxx xxxxxxxx

A.A.S.

It may be pointed out that while in parallel provisions of sect.15 of the Bombay District Municipal Act.1901, the words are "may be a councillor" , while drafting sect.12 of the Bombay Municipal Boroughs Act, for the words "may be" the words "may become" were substituted in sub-section(1), but the words " may be" were retained in sub-section(2). The word "be" means to exist with reference to an event; to come into existence;to continue in existence (vide Webster's New International Dictionery) . The words "may be a councillor" in sub-section (2) of sect.12 appear to convey that no person who has nay of the disqualifications specified in clauses (a) and (b) shall be entitled to continue to exist as a councillor of the Municipality.

From the Collr's order dated 2-1-48, it appears that in the year 1944 Mr. Jadhav stood surety for the Municipal employee Mr. Landge, who was working as a temporary Asstt. Accountant. The fact that Mr. Landge gave another surety bond on 15-10-47 shows that when Mr. Jadhav was elected as a councillor in 1946, he was

p.3 ante

admittedly a surety for Mr. Landge, and had thus an interest in the employment of Mr. Landge under the Municipality. In Satyandra V. the Chairman, Municipal Corporation, Dacca, A.I.R.(1931) Cal 286)it was held that in determining the eligibility of a candidate, the circumstances and the position of the candidate as they existed at the date of nomination and not at the date of election, should be considered . Consequently, the date vital for determining whether a candidate is qualified for election would be the date of nomination (Cf. R.L.A.'s No.11378, dated 28-11-47). As at the time of his nomination Mr. Jadhav was/disqualified for election x and as that disqualification continued to exist, his election was in contravention of the provisions of sect.12(3)(b) of the Bombay Municipal Boroughs Act,(R.L.A.s No.7778 dated 2-8-39). As he was disqualified to be elected his subsequent action in revoking the surety bond when the Collr. was seised of the complaint x made against him would not legalise his election. As Mr. Jadhav's election was in contravention of sec. 12(2)(b) , his seat has become vacant under sec.12(4). The view expressed by the x Collr. of Poona is not correct./

Id/.....28/2.

U.R.to H.S.L.C.D. No.2105 dt.2-3-1948.

DYP.

Appeal to Provincial Government.

The Bombay Municipal Boroughs Act, 1925.

The question raised for the consideration of the R.L.A. is whether in cases in which the Collector has declared that no vacancy has arisen, an appeal can lie under section 28(2) of the Bombay Municipal Boroughs Act, 1925.

2. Sub-section (2) of section 28 of the Bombay Municipal Boroughs Act provides:-

" In every case the authority competent to decide whether a vacancy has arisen, shall be the Collecter. A Collector may give his decision either on an application made to him by any person or on his own motion. Until the Collector decides that the vacancy has arisen, the councillor shall not be disabled under sub-section(1) from continuing to be a councillor. An appeal shall lie against every such decision of the Collector to the Provincial Government and the orders passed by the Provincial Government on such appeal shall be final; provided that no order shall be passed under this sub-section by the Collector against any councillor without giving him a reasonable opportunity of being heard."

The words" such decision of the Collector" are not restricted to the decision of the Collector that a vacancy has arisen, for the preceding sentence does not provide for any decision of the Collector. All that it says is that until the Collector decides that the vacancy has arisen, the councillor shall not be disabled under sub-section(1) from continuing to be a councillor. In other words, it only provedes for the continuance of the councillor pending the decision of the Collector that the vacancy has arisen. The decision in the expression "such decision" is the one contemplated by the two opening sentences of the sub-section. That decision is whether a vacancy has arisen; and it is, therefore, obvious that it can either be in the affirmative or in the negative. Either kind of decision is, therefore, made appealable. The decision can be given upon an application by any person; and here again it is apparent that the application would ordinarily be by a person who seeks to unseat the councillor, since a councillor is not likely to raise himself the question whether a vacancy has arisen. There is nothing in the section to suggest that an applicant who so seeks to unseat a councillor was to be denied the right of appeal if the

Collector decided against him. Such applicant would ordinarily have a right of appeal; for a provision which permits him to raise the question would ordinarily entile him to pursue it until he got a final answer which according to the scheme of the section, Government alone is competent to give. This view is also supported by Messrs. Gandhi and Patel in their Bombay Municipal Boroughs Act, where at page 78, it is stated that " under sub-section(5) of section 12, which is similar to sub-section (2) of section 26, " an appeal lies to the Provincial Government against the decision of the Collector whether it is in favour of the councillor or against him". In the circumstances the view taken by the Health and Local Government Department in para.2 of its office not p.15 ante is not correct.

Id/.....30/1.

Remembrancer of Legal Affairs.

U.R. to Health and Local Self Government Department, No.1067, dated the 2nd February 1940.

DYR.

It appears that the President of the Surat Borough Municipality placed before the General Board at its meeting held on 15-10-1946 his report making grave and serious allegations against the conduct and behaviour of the Chief Officer, Mr.D.B. Malia. Before the General-Board took up the report for consideration, Mr. Malia presented an application to the President expressing his desire to retire from the post of the Chief Officer and to be relieved of his duties.

Thereafter the General Board resolved:

" The meeting of the Surat Borough Municipality resolves that Mr. D.B.Malia be allowed to with draw from the Municipal service from 15-10-1946 before office hours as desired by him and the proceedings be taken over to the President's Confidential Dar etc.".

At the Special General meeting held on 7-11-1947 the Municipality considered the question of granting pension to Mr. Malia and resolved:

" Whereas Mr.D.B.Malia has withdrawn himself from the office of the Chief Officer and whereas th Municipality has allowed him to withdraw from service and whereas it is the desire of the Municipality that his pension and other rights should not be prejudiced, this Municipality resolves that the Government of Bombay moved to grant the following concessions to Mr.D.B.Malia with effect from the date of his withdrawal:-

(1) Grant of pension under rule 203(b) on the basis that Mr.D.B.Malia has completed 20 years' service. Mr.D.B.Malia has actually completed service of 19 years and 9 months, but as otherwise he would be entitled to one month's privilege leave and two years' furlough leave preparatory to retirement, this Municipality considers that the period of his service should be taken as 20 years complete and his pension fixed on the basis of average pay during the period of furlough and one year preceding.

(2) As one month's privilege leave on full pay and two years' furlough on half average pay are denied to Mr.D.B.Malia consequent on his withdrawal, this Municipality resolves that Government of Bombay be moved to accord sanction as a special case to payment of lump compensation equal to the difference between the absentee allowance that would have been drawn by Mr.D.B.Malia had the privilege and other leave due been enjoyed by him preparatory to retirement and the pension fixed under (1) above".

In his endorsement dated 10-12-1947, the Commissioner, N.D., observes:

> " There is no provision either in the Municipal Rules made under section 58(h) of the Municipal Boroughs Act, or in the instructions in General Department Memo. No.S-120, dated 17-9-1945, to grant pension to Municipal employees in case of their resignation or withdrawal from service. Therefore, as the Schedule and rules stand, the proposal of the Municipality to grant pension (and Compensation) to Mr. B.B.Malia, Ex-Chief Officer, who withdraw from the Municipal service on 15-10-1946, is irregualr and therefore cannot be recommended."

The Under Secretary, Health and Local Government Department, however, considers that, from the wording of Mr. Malia's letter to the President, it may be taken that he has retired from Municipal Service at the instance of the majority of the members of the Municipality and this type of retirment can as well be covered by the word " retirement" used in section 58(h) of the Bombay Municipal Boroughs Act, 1925. The R.L.A. is requested to advise whether the Municipality's proposal to grant pension to Mr. B.B.Malia on the basis of 20 years service is intra vires. section 58(h) of the Bombay Municipal Boroughs Act, and the rules and thereunder.

2. Under section 58(h) of the Bombay Municipal Boroughs Act, 1925, the Municipality has powers to make rules regulating the period of service o its officers and servants and determining the conditions under which such officers and servants or any of them shall receive pensions, gratuties or compassionate allowances on retirement or on their being disabled through execution of their duties and the amount of such pensions, gratuities or compassionate allowances; and prescribing the conditions under which any gratuities or compassionate allowances may be paid to the surviving relatives of any such officers or servants whose death has been caused during the execution of their duty. The Surat Municipality has framed rules under this provision and they are contained in chapter VIII of the Surat Borough Municipal Rules. Under rule 199 of the Rules in that Chapter, every Municipal Officer and servant is entitled to

and may be required to retire on completion of 30 years municipal service or on attaining the age of 55 years and shall in no case be permitted to remain in municipal service if he hands become physically or mentally unfit for the due discharge of his duties. Rule 202 provides:

> " No person k shall be at liberty to resign his office or withdraw himself from the duties thereof unless expressly allowed to do so in writing by the authority which has the power to appoint him, or unless he shall have given such authority one month's notice or, if his pay exceeds Rs.15 per month, 3 months' notice of his intention to do so; and every person who k shall resign or withdraw himself without such leave or notice shall be liable to forfeit to the Municipality a sum equal to one month's or 3 months' pay, as the case may be."

Rule 203 prescribes the scale of pension allowable to a municipal servant on retirement on the basis of years of service. This rule is subject to the provisions of the following rules contained in the Chapter. One of these following rules is rule 211, which provides:-

> " Tes any municipal officer or servant who has completed 10 years service and is not entitled to or in receipt of pension from Government, the Municipality may grant a gratuity or pension on his retirement under rule 199 or on a medical certificate under rule 201, or on his becoming disabled though the execution of his duty as municipal officer or servant".

The only provisions in this Chapter which relate to retirement are contained in rule 199 and rule 201. Rule 202 does not deal with retirement as such, although the marginal note speaks of notice before retirement. Rule 203 which prescribed the limits of pension and gratuity to superior servants must, therefore, be read with rules 199, 201 and 211; in terms it is made subject to the provisions of rule 211 and rule 211 makes it abundantly clear that it is intended to apply to retirement under rule 199 or under rule 201 and not to withdrawal from duties under rule 202. It does not seem to be the intention of the rules in this Chapter that a person who resigns or withdraws himself from

duty be giving proper notice should be able to claim a pension on the ground that he has retired from service.

3. However, I endorse the view taken in R.L.A.'s opinion No. Munis.Cities-36/29, dated the 17 the December 1929, that the word "retirement" used in section 58(h) need not be restricted in its meaning so as to exclude resignation at any time at the option of the Servant concerned and that the statute does not therefore limit the discretion of the Municipality to frame a rule for granting pension in cases of retirement of this kind. But, as the rules stand, Mr.Malia would not be entitled to any pension. The Municipality itself seems to have been fully aware of this position for its resolution does not purport to grant pension to Mr. Malia under the rules but is intended to move Government to grant concessions to Mr. Malia on the lines of its recommendations. The recommendations do not fall within the frame work of the rules.

4. The next question for consideration is whether the Municipality can grant pension to Mr. Malia with the sanction of Government as intended by its resolution. A Municipal Corporation being an artificial person can only act through a medium of the body created for its administration and in the discharge of those duties that body would be bound by the statutory provisions. Under section 63(2) of the Bombay Municipal Boroughs Act, the Municipal property has to be managed and controlled and applied by the Municipality as a trustee subject to the provisions and for the purposes of the Act; and under section 65 the municipal fund which forms part of such property has to be similarly administered. Section 66 provides that the municipal fund all property vested in the Municipality shall be applied for the purposes of this Act within the limits of the Municipal borough and the proviso thereto lays down that it shall be lawful for .....

for the Municipality with the sanction of the Provincial Government or any ~~its~~ officer duly authorised in this behalf to incur expenditure or to make contributions and create scholarships as provided in clauses (a) to (e). It is, therefore, clear that when express provisions have been made by rules made under the Bombay Municipal Boroughs Act regulating the payment of pensions to the Municipal servants, the Surat Municipality would be bound by those provisions and the grant of any pension not provided for by those rules would be ultra vires. There is no provision in the Bombay Municipal Boroughs Act enabling a Municipality to incur any expenditure out of its fund for payment of any pension otherwise than under the provisions of the rules even though Government sanction is forthcoming. However, from the precedents quoted by the Health and Local Government Department (See G.O., G.D., Nos 5277, dated 29-7-1918; 3207, dated 17-4-1919; 3519, dated 29-4-1919 and 2398, dated 27-4-1922), it appears that Government has sanctioned similar payments in the past to municipal employees as special cases. The question was presumably never referred to the R.L.A. and the legal aspect does not seem to have been considered.

5. It must be confessed that denial of pension would be unjust to Mr. Malia. He put in an application for retirement as such apparently on the understanding that the Municipality would grant him pension on the basis of his past service. That was all along the intention of the Municipality and, therefore, they decided not to pursue the enquiry into the allegations in regard to Mr. Malia's conduct. Two courses now seem open to Government. The absolutely correct course in law is to frame a rule under section 56(h) which would not only cover his individual case but all other cases of retirement for which no provision has been made in the existing rules. It seems that an attempt was made by the Municipality to insert a new rule. It is for Government to decide whether the Municipality should be advised to renew the attempt by submitting a general rule more suitably worded than the one they suggested before. Mr. Malia's case may then be disposed of under such rule. If it is felt that this

this course is not immediately practicable and that it is unduly cumbersome to meet the case of Mr. Malia, Government may consider the expediency of following the former precedents quoted in paragraph 4 above and of sanctioning the pension recommended by the Municipality as a special case, if, presumably, no rate-payers is likely to take the matter to a court of law.

6. Even if the latter course be adopted, I would still suggest that, with a view to make permanent provision for such cases which periodically crop up, a new rule should be framed at an early date.

Id/.....10/5.

Remembrancer of Legal Affairs.

U.R. to H.E. L.G.D.No.4577 dated the 12th May 1948.

MR.

Delegation of powers to the President.

Bombay District Municipal Act, 1925.

R.L.A.'s No.7948, dated 1.8.1947.

Rule 9 of the Rules framed by the Poona Municipality under section 46(b) of the Bombay District Municipal Act,1901, and continued under the corresponding section 58(b) and (c) of the Bombay Municipal Boroughs Act, 1925, provides for delegation of powers and duties mentioned in column 2 of Schedule B to any of the individuals mentioned against them respectively in column 4 of that Schedule. In his last opinion No.7948, dated 1st August 1947, R.L.A. opined that although section 58 of the Bombay Municipal Boroughs Act does not provide for the delegation of powers and duties of the Municipality to the President, still rule 9 drives support from section 46 which is complementary to section 58 and is intra vires. Health and Local Government Department has now raised two questions for R.L.A's consideration. The first question is whether the resolution passed by the Poona Municipality delegating powers to the President over the Municipal staff would not remain ineffective, until Schedule B is properly amended since the power over the municipal staff is not mentioned in column 2 of that Schedule. The Schedule B, as it stands, does not specify in column 2 the powers of the Municipality over the municipal staff. Consequently unless and until that Schedule is properly amended, the delegation of powers of the Municipality over its staff to the President cannot be made and the resolution passed by the Municipality for that purpose would remain ineffective. Schedule B would therefore require to be amended, as suggested by Health and Local Government Department. The view taken by that Department on this question is, therefore is correct.

The second question for consideration is whether it would be better to regularise the position of rules 9 to 12 and the Schedule B so as to conform with the provisions of the Bombay Municipal Boroughs Act. As stated above, rule 9 to 12 were framed under section 46(b) of the Bombay District Municipal Act and have been continued in the force under section 58(b) and (c) of the Bombay Municipal Boroughs Act, and that section

58(b) does not provide for any delegation of the powers and duties of the Municipality to the President. If that delegation is to be made validly to the President, it will have to be done only under section 46 of the Bombay Municipal Boroughs Act. Consequently rules 9 to 12 is so far as they relate to the delegation of powers to the President will have to be deemed to be made under section 46. It would, therefore, be desirable to regularise the position by saying that these rule are also framed under section 46 of the Bombay Municipal Boroughs Act. The view taken by H. and L.G.D. is correct.

Id/.....2/6.

Remembrancer of Legal Affairs,

U.R. to H.and L.G. Department, No.5313 , dated the 4th June 1948.

DYR.

Office of the R.L.A.

construction of a theatre without leaving road margin

BOMBAY MUNICIPAL Boroughs Act, 1925 & Bombay Land Revenue Code, 1879.

It appears that Mr. Manibhai . H.Patel of Nadiad applied to the Chief Officer of the Nadiad Municipality for permission to construct a cinema theatre in Survey No.534 Tika No.9 of Nadiad and the Chief Officer granted him the permission subject to the condition that a margin of 30' should be kept from the boundary of the Nadiad Anand Road. Mr. Manibhai preferred an appeal against that order of the Chief Officer to the Nadiad Municipality requesting that the condition imposed by the Chief Officer regarding margin should be deleted. The Municipality by its resolution No 155 dated 28 th July 1947 granted his request and deleted the condition imposed by the Chief Officer. The Collector of Kaira, however, considered this resolution of the Municipality unlawful because the permission without imposing the road margin was in contravention of G.R., R.D.No.10204/24/-VIII dated 27-6- June 1945 and G.R. P.W.D. No.680/36, dated 27-6-1945. The collector, therefore, in exercise of powers conferred by sub-sect (1) of section 214 of the Bombay Municipal Boroughs Ac directed that the execution of the Municipality's resolution should be suspended. The Commissioner by his order dated 22nd November 1947 continued the operatio of the Collector's order until a fresh resolution was passed by the Municipality in consonance with the provisions of the aforesaid G.Rs., the reason being th the resolution of the Municipality was likely to cause permanent injury and annoyance to the public. He has has submitted the papers to Government as required by sub-section (3) of section 214 of the Bombay Municipal Boroughs Act. The Health and Local Government Department considers that the Collector's order is clearly illegal ~~and unwarranted~~ as the Municipality was competent to revise the Chief Officer's order and its action could not be considered as illegal. The R.L.A. is requested to advise whether the view taken

by H & L.SG.D.is correct.

Section 214 (1) of the Bombay Municipal Boroughs t,1925, provides that if, in opinion of the Collector, the execution of any order or resolution of a Municipality, or the doing of anything which is ab out to be done or is is being done by or on behalf of a Municipality is causing or is likely to cause injury ar annoyances to the Public, or to lead to a breach of the peace, or is unlawful, he may by order in writing under his signature suspend the execution or prohibit the doing thereof. It is, therefore, apparent that the resolution of the Nadia Municipality can be suspended by the Collector only if the execution of such resolution is causing or is likely-

(a) to cause injury or annoyance to the public, or

(b) to lead to a breach of the peace, or

(c) is unlawful.

There does not appear to have been a regular line of public street prescribed by the Nadiad Municipality under secion 118, nor does it appear that any by-law if framed under section 61 prescribing any road margin for constructing buildings. It is, therefore, apparent that the Nadiad Municipality had no power to impose any condition about road margin in the present case. Consequently, the Municipality was competent to delete the condition imposed by the Chief Officer and its resolution was lawful. The Municipality's resolution granting permission to Mr. Manibhai to construct a cinema theatre without any ro ad margin could not also lead to a breach of peace. The construction of a theatre abutting a road without leaving any road margin is not likely to cause injury to the Public. 'Annoyance' no doubt is a wider term than nuisance but even if that word be construe liberally to mean anything which reasonably troubled the mind and pleasure of sensible person, it would be difficult to hold .....

hold that the erection of a theatre would cause annoyance in this sense.

It appears to be the Collector's view that the Municipality's resolution is unlawful inasmuch as it contravenes the orders of Government contained in G.R., R.D.No.10204/24-VIII dated 27-6-1945 and G.R., P.W.D.No. 660/36 dated 27-8-1945. The instructions presumably become applicable and get statutory force when the land is being converted to Non-Agricultural use under the Land Revenue Code. In other cases, they would have no force of law. Consequently, the view of the Collector that the Municipality's resolution is unlawful is not correct. Further, as pointed out above, the view of the Commissioner that the resolution of the Municipality is likely to cause permanent injury or annoyance to the public is also not correct. It follows, therefore, that the order issued by the Collector under section 214(1) of the Bombay Municipal Boroughs Act and continued in force by the Commissioner is ultra vires. The view taken by H.C.& S.C.D. is correct.

The aforesaid view expressed by the H.A. is based on the assumption of there is no statutory provision prohibiting building within a particular distance of public roads. If there is no such provisions, it would appear necessary to make one.

14/.....13/5.

Remembrancer of Legal Affairs.

U.P. to H.C. L.C.D., No.4630 D/- 13th Nov 1946.

DKR

A.A.S.

From the order of the Collector of Poona dated 2.1.1948, it appears that it was the Lonavala Municipality which referred the question ~~xx~~ about disqualification of Mr. Jadhav as a councillor of the Municipality. The Collector's decision was communicated to the President, Lonavala Municipality, One Mr. Himatlal Devchand Shah, a councillor of the said Municipality has preferred an appeal to Govt. against the said decision of the Collector of Poona. For the reasons stated in Govt. letter No.S-137/6712-A, dated 9.4.48, the Collector of Poona was requested to revise his order, but the collector expresses doubuts whether it is opens to him to revise his own order, and states that it would be better and legally ~~x~~ sound if Govt. modified the order in appeals under section 12(5) of the Bombay Municipal Boroughs Act. He states that the Lonavla Municipality has also represented that " the orginal complaint against the councillor, Mr. Jadhav, was from the Municipality, and it is, t herefore, not understood how a right of appeal to Govt. accrued to Mr. Shah Himatlal Devchand, councillor of the Lonavala Municipality. The Municipality further points out that in the present case it is for Govt. and not the Collr, to issue orders on the appeal etc.".

In exercise of powers conferred by section 12(5) the H.and L.G.Department proposes to issue orders setting aside the Collr's order. The R.L.A. is requested to advice whether the draft order is in order and also para. 4 of the office note dated 8-6-1948.

The question for R.L.A's consideration is whether the view expressed in para. 4 that the right of appeal under sec.12(5) is not denied to any person who feels himself aggrieved by the decision of the Collr. is coffect.

Id/ 14/7/-.

P.T.O.

Reply may be:-

The view taken by H & L. Govt Department in para 4 of its office note at p. 26 ante is correct and the draft order at 33 ante is in order.

U.R.to H.& L.G.D.No.6671 dated 16-7-1948.

Office of the H.L.A.

The Bombay Municipal Boroughs Act,1925.

"Approval" of the Government under sec. 58(c).

...he power vesting in Government under the proviso to section 58(c) of the Bombay Municipal Boroughs Act,1925 to approve a rule determining the pay of the Chief Officer of a municipality does not include power to amend or modify the rule proposed by the municipality. Consequently it would not be competent for Government to sanction for the Chief Officer of the Hubli Municipality a scale of pay lower than that proposed by the Municipality. If Government is not prepared to approve the scale of pay as proposed by the Municipality, Government may x inform the municipality accordingly indicating at the same time xx what scale of pay would be approved by Government, so that the municipality, if agreeable to that scale, may pass a resolution accordingly and seek Government's approval.

Id/.....15/9.

Secretariat of Legal Affairs.

U.R. to H.S L.G.D.No.6795 dated 17th September 1948.

DXR

Bombay Municipal Boroughs Act, 1925. Section 152(1), (2).

The view taken by H.and L.C.Department in its office note at pages 63-65 ante is correct and the action taken by the Chief Officer, Poona, Municipality is not lawful.

Section 152(1) of the Bombay Municipal Boroughs Act, 1925 itself appears to make a distinction between an encroachment or obstruction and placing or depositing in any public place or street and sub-section (2) provides for the removal of encroachment or obstruction but not of article placed or deposited in any public place or street. Consequently the powers under sub-section (2) would not be available for the removal of goods placed or deposited on roads nor can they be invoked for the purpose of recovering the costs of removal of such goods.

Ld/.....20/8.
Remembrancer of Legal Affairs.

U.O.to H. And L.C. Department, No.6134 dated the 25th August.1948.

DVR

Office of the R.L.A.

Question whether publication of notice and the schedule is adequate.

Bombay Municipal Boroughs Act, 1925- Sections 60, 75, 192(3).

The Poona City Municipality has been levying octroi duty on ad valorem basis and also on the basis of weight. As provided by clause (a) of section 75 of the Bombay Municipal Boroughs Act, 1925, read with section 60(2), the Municipality passed a resolution on 29.4.1947 proposing modifications and alterations in the Schedule to the Octroi Rules. As required by clause (b) of section 75, read with section 192(3), a notice in the form of Schedule II was published in the local newspaper Kal without the revised octroi schedule. The Commissioner, C.D., reports that unofficial enquiries made from the Municipality show that the notice in the form of Schedule II annexed to the Bombay Municipal Boroughs Act, as also the revised octroi Schedule, were published simultaneously on the notice board of the Municipal office and also in the Municipal market. He considers that such publication is not legally sufficient. In his letter dated 22.7.1947, the President, Poona City Municipality, admits that the revised octroi schedule was not published along with the notice in the issue of Kal dated 6.8.1947. He however, states that the Schedule was published on the Municipal notice board as an appendix to the notice under section 75(b) put up on the notice ~~maker~~ board on the same day the notice in Kal appeared. In his subsequent letter dated 27.8.1948 the President further states that it was not published in any public place and there are no bye-laws framed by the Municipality for such purpose as contemplated by section

192(3) of the Act. He, however, considers that, as the notice was put up on the notice board of the Municipality along with the proposed octroi schedule, it was sufficient under section 192(3). The H. and L.C.D. considers that the publicity given by the Municipality was not adequate as required by law and consequently the Municipality should publish the notice and the schedule afresh. The E.L.A. is requested to the advise whether the publicity is adequate and whether Government can accord sanction to the revised octroi schedule.

Clause(a) of section 75 of the Bombay Municipal Boroughs Act,1925, prescribes the preliminary procedure to be observed for imposing a tax. Sub-clause (b) provides that when such resolution has been passed, the Municipality shall publish the rules so approved with a notice in the form of Schedule II affixed thereto. The publication of the rules so approved with a notice in the forms of Schedule II will have to be done as provided in section 192(3), which enacts:

" Every notice which this Act requires or empowers a municipality or any municipal authority or officer to give or to serve either as a public notice or generally or by the provisions which do not expressly require notice to be given to individuals therein specified shall be deemed to have been sufficiently given or served if a copy thereof is put up in such conspicuous part of the municipal office during such period and in such other public buildings and places, or is published in such local papers or in such other manner, as the municipality in a by-laws in this behalf prescribes."

It is clear from this provision that it is necessary that the Municipality should frame by-laws prescribing the manner of publication of every notice required to be given or served either as a public notice or generally. Having regards to the form of the notice given in Schedule II to the Act and also its underlying object, as also to the wording of section 75(b), the notice would have to be published in the manner prescribed by the by- laws from

under section 192(3). B.L.A.'s opinion No.10/29, dated the 6th May 1929 in respect of the interpretation of section 61(2) can be distinguished in as much as the section itself gives latitude to the Municipality to determine the mode of publication. Since, however, no by-laws have been framed by the Poona Municipality under section 192(3), prescribing a conspicuous place in which and the period during which a notice should be published, the publication of the octroi schedule with the notice made by the Poona Municipality must be deemed to be inadequate inasmuch as all taxing laws must be strictly construed and the object of the publication is to give to the persons to be affected thereby an opportunity to raise objections to the levy of the tax. Section 23 of the General Clauses Act would not be available since the mode of publication has been specifically prescribed by section192(3) of the Bombay Municipal Boroughs Act. It, therefore, follows that the publication of the revised octroi schedule with the notice in the form of Schedule II to the Bombay Municipal Boroughs Act made by the Poona Municipality being inadequate Government cannot accord sanction. The Municipality should be asked to frame by-laws under section 192(3) and then publish the revised octroi schedule with the notice in Schedule II in accordance with the by-laws thus framed.

Id/——————12/11.

Remembrancer of Legal Affairs.

U.R. to H.and L.D.Department, No.10697, dated the 16th November 1946.

DYR

It is not necessary to take action as suggested by Secretary, H. & L.S.D., in his note at p.60ante.

2. Under section 10(1)(c) of the Bombay Municipal Boroughs Act,1925, power has been given to the Provincial Government to make rules for each municipality consistent with the Act providing inter alia for the preparation and revision of the list of voters from time to time, fixing the date after which no application for enrolment in any such list under preparation or revision shall be received, determining the manner in which and the authority by whom any objection to such list in regard to the names entered therein or omitted therefrom may be heard and decided, and to what judicial authority the appeals as to such entries and omissions shall lie; prescribing the date for the publication of the municipal election rolls and regulating generally such elections. Under section 23(1) of the Act, when in accordance with rules framed under clause (c) of sub-section (1) of section 10 a list of voters has been prepared or, upon a general revision completed, a copy thereof signed by such person as may be designated in this behalf in the rules aforesaid shall be the municipal election roll. Under sections 14 a person shall not be qualified to be elected a councillor unless he has been enrolled on the Municipal Election Roll. Rules under section 10(1)(c) have been framed by the Provincial Government for the Ahmedabad Municipality. Rule 6 of these Rules provides for the publication of the list of voters. Under rule 10 of these Rules a person whose name is not entered in the list of voters and who claims to be entered therein has a right to apply in writing within a fortnight from the date of the publication of the list to the Returning Officer for amendment thereof. The Returning Officer has to forward on every such application with his report thereon for the decision of the Standing Committee. The Standing Committee has then to consider and pass orders on such application. The rule also provides for an appeal to District Judge from the decision of the Standing Committee. The appeal has to be heard under the rule by the District Judge or, if the District Judge so directs, by a Joint Judge or an Assistant Judge or a subordinate Judge nominated by the District Judge specially for the case or for such cases generally. Then follows rule 11.

Under sub-rule (1) of that rule when the list of voters has been prepared, and where necessary revised as hereinbefore provided in accordance with any order passed in that behalf by the Standing Committee or the judge in appeal, a copy thereof signed by the Returning Officer shall be the Municipal Election Roll. Sub-rule(2) of that rule provides that the Municipal Election Roll shall be published in the manner prescribed in rule 6 not later than 45 days from the date on which the lists of voters was published under that rule. It will be seen from the above provisions that the Act requires that a date for the publication of election roll should be prescribed and once the Municipal Election Roll is published on the prescribed date, the roll is final and the person whose name is not enrolled in the Municipal Election Roll so published shall not be qualified to be elected a councillor. A question arises whether in view of the provisions of sub-rule(1) of rule 11, the Municipal Election Roll cannot be published unless the appeal made to the District Judge against the decision of the Standing Committee under Sub-rule (5) of rule 10 is decided and the list is revised in accordance with the result of the appeal. The view taken by the Assistant Judge, Ahmedabad, in this judgement at pp.1-9 ante is that the Municipal Election Roll will have to be a list revised in accordance with the result of the appeal and signed by the Returning Officer after that revision. This view does not seem to be correct. There is no provision under the Rules which requires that the Municipal Election Roll shall not be published before appeals made to the District Judge against the decision of the Standing Committee are decided. On the contrary Sub-rule(1) of rule 11 provides for revision of the list of voters.....

voters where necessary. The words " Where necessary" are important They imply that the list of voters shall be revised if such revision becomes necessary as a result of the decision of the D.J. But if there is no decision of the D.J.within the time limit prescribed by sub-rule (2), no revision is necessary, and the election roll can be published without any amendments. If the intention was that the final list of voters should be revised in accordance with the decision of the District Judge and published within the time limit prescribed under rule 11(2), a provision requiring the Judge to give his decision within some prescribed time would have been made on the lines of sub-rule(8) of rule 20 of the Bombay Legislative Assembly Electoral (Preparation, Revision and Publication of Electoral Rolls) Rules, 1936. If the view taken by the Assistant Judge were to prevail, a decision given by the District Judge after the elections are held would affect the elections and lead to an impossible position.

3. It may be pointed out here that the observations of the Assistant Judge in the present case that the Municipal Election Roll will have to be revised in accordance with the result of the appeal must be regarded as obiter. They have got no binding force since under rule 10(6) of the Election Rules, he has no jurisdiction to give any decision on this point.

4. In view of this legal position, it is unnecessary in my opinion to extend the term and in the meantime to amend the rules. The rules have been in force for some considerable time. The question of amending them on the lines of the Legisla - tive Assembly Electoral(Preparation, Revision and Publication of Electoral Rolls) Rules, 1936, may therefore, be separately taken up in consultation with municipalities. The amendment sugg ested in this case would not serve the purpose.

5. In the meantime, the election programme for the present election need not be disturbed. Id/.....

Remembrancer of Legal Affairs.

U.R. to H.& L.G.D.No.277-L. dated 22nd October 1948 .

Construction of "Mahatma Gandhi Boarding House".

Section 66(b) and 71(r).

The Bombay Municipal Boroughs Act,1925.

It appears that the Karad Municipal Borough has resolved to spend Rs.25,000 for erecting a statue of Mahatma Gandhi and constructing and maintaining "Mahatma Gandhi Boarding House", reserving 60 per cent. of the seats therein for Harijan students. The Examiner, Local Fund Accounts, in his letter at p.1 ante states that, as the Boarding House is presumably intended for students coming from outside, ~~however~~ technically such a scheme is not covered by section 66(b) of the Municipal Boroughs Act, under which contribution could be made towards expenditure affecting health, instruction, safety or convenience of the public and calculated to benefit the residents within the limits of the contributing municipality. Under Secretary, H. and L.G.D., invites attention to section 56(c) of the Bombay District Municipal Act, 1901, and has requested the R.L.A. to advise whether the Karad Municipality can contribute towards the construction of the Boarding House for students coming from outside the Municipal area.

2. The Karad Municipality has been included in Schedule I to the Bombay Municipal Boroughs Act with effect from 1.8.1946, and would, therefore, be governed by the Bombay Municipal Boroughs Act. Consequently reference to section 56(c) of the Bombay District Municipal Act,1901,would be irrelevant. Section 66(b) of the Bombay Municipal Boroughs Act permits contribution towards expenditure for measures affecting health, instruction, safety or convenience of the public and calculated to benefit the residents within the limits of the contributing Municipality. If the Mahatma Gandhi Boarding House is intended for students coming from outside the Municipal area, evidently section 66(b) will have no application as the measure could not be for the benefit of the residents within the limits of the Municipality.Section 71(r) provides for discretionary powers of the Municipality

to incur expenditure on any other measures not specified in section 68 likely to promote the public safety, health, convenience or education. Apparently such a measure must promote the public health, safety, convenience or education of the residents within the municipal area, for the municipal funds are required to be spent for the benefit of the residents within the municipal area. If, as stated above, the Mahatma Gandhi Boarding House is intended to provide for students coming from outside the municipal area, it would not come within the ambit of clause (r) of section 71. Consequently the contribution of the Karad Municipality towards the erection of the Mahatma Gandhi Boarding House, would not be permissible under the x provisions of the Bombay Municipal Boroughs Act.

Id/.....10/11.

Remembrancer of Legal Affairs.

U.R. to H. and L.G.Department, No.10554, dated 10th November 1948.

Whether the seat of Mr. S. who was sentenced can be declared vacant after his sentence was remitted.

Bombay Municipal Boroughs Act, 1925 S. 12(1)(a)(i) and 28(2).

Code of Criminal Procedure, 1898 S. 401.

R.L.A.'Opinions. No.3509/ d/-24-6-1931. No.7893 d/-28-10-1931. No.311 d/-17-1-1936. and No.2954 d/-6-4-1942.

It appears that Mr. Sanas, President of the Poona Municipality, was sentenced to six months simple imprisonment by the High Court, Bombay, on 15th July 1948 for the offence punishable under section 7 of the Essential Supplies (Temporary Powers Act, 1946. By an order No. S. 71/196-C dated the 14th September 1948, Government decided to release Mr. Sanas on medical grounds as he was suffering from acute appendicitis and the unexpired portion of his sentence was remitted under section 401 of the Criminal Procedure Code. Before he was released from Prison, the Collector, Poona did not declare his seat vacant under section 28(2) of the Bombay Municipal Boroughs Act, 1925. Immediately on his release from prison, Mr. Sanas has assumed charge of his office as President of the Poona Municipality. The question raised for R.L.A.'s consideration are: (1) Whether Mr. Sanas's seat can be now declared vacant under section 28(2) and if so (2) whether the Collector can be directed by Government to so declare the seat vacant.

Under section 29(1)(a) of the Bombay Municipal Boroughs Act, 1925, if any Councillor during the term for which he has been elected nor nominated becomes subjects to any disqualification specified in section 12 he shall subject to the provisions of sub-section (2) be disabled from continuing to be a Councillor and his office shall become vacant. Under clause (a)(i) of section 12(1) no person may become Councillor who has been sentenced by a Criminal Court to imprisonment for an offence punishable with imprisonment for a term exceeding six months or to transportation, such sentence not having been subsequently reversed or quashed if and so long as such sentence has not expired.

The words " if and so long as such sentence has not expired" clearly indicate that the disability will continue until the sentence has expired. ✱ Consequently, if a seat is to be declared vacant on account of such disability under this provision, it will have to be done only before the expiry of the sentence; for, once the sentence expires disability no longer subsists. (See H.L.A's opinion No.311 dated 17.1.1936 and H.L.A's opinion no. 2954 dated 5.4.1942.).

In the present case Mr. Gones was sentenced to imprisonment on 15-7-1948 for a period of six months and that sentence would ordinarily have expired on 15th January 1949 subject to any remissions remissions under the Prisoners Act; and action for declaring him to be disqualified could have been taken before such date of expiry. But by reason of remission his sentence expired on 14th September 1948. By that time, no action was taken by the Collector under section 28(2) to declare his seat vacant. Consequently the main question for consideration would be whether, notwithstanding the remission, his sentence, which in the absence of remission under the Prisoners Act would otherwise have expired on 15th January 1949, has not yet expired within the meaning of section 12(1)(a).

A similar point was considered by the H.L.A. (Mr. Macklin) in his opinion No.3509 dated the 24th June 1931 which is quoted below insentence for facility of reference:

" The question is whether premature release carries with it expiry of the sentence. There are no reported cases on the point, but it would appear that the Sentence of imprisonment(as distinct from the imprisonment itself) does not expire until the date fixed by the order of the Court. If an offender is pardoned, his sentence expires from the date of the pardon because the whole offence (and the sentence with it) is wiped out. But this is not the case with a ' remission of the unexpired portion of the sentence'. When Government remits in this way, it says in effect ' you need not finish your sentence'. But it does not say ' Your sentence is finished.'.

This view was reiterated by Mr. Macklin in his opinion No. 7693 dated 23-10-1931. However, in his opinion No.2954 dated 6-4-1938 the R.L.A.(Mr.K.P.H.Moos) remarked that there was no reported authority for such a position and that the point was not quite free from doubt. If, Mr. Macklin's opinion is correct Mr. Sanas could even now be declared disqualified under section 28(2). But with due respect I am unable to endorse that opinion sentence, as the term is used in criminal law, is the appropriate word to denote the action of the Court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained. It is the declaration of punishment allotted to the person condemned in criminal trial. If the punishment comes to an end, the sentence naturally ceases to be effective. When the imprisonment expires the sentence of imprisonment is exhausted and therefore comes to an end i.e.expires. The language used in sub-section (a) of section 401 viz. " to undergo the unexpired portion of the sentence" itself suggests that the section hardly warrants the distinction between " sentence" and "imprisonment" See also sections 31 and 32 of the Code of Criminal Procedure. There is no practical difference for this purpose between an unconditional remission of sentence and a pardon. In Pyankatesh Yeshwant V.Emp(I.L.R. 1940 Nag 1 It was held that the effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its ~~xxxxxxx~~ operation. It is thus clear that the sentence expires as soon as the unexpired portion of the imprisonment is unconditionally remitted.

In the circumstance, it appears that by reason of remission granted to Mr. Sanas by Government, his sentence has already expired and consequently it would not be now legally feasible to declare his seat vacant under section 28(2) of the Bombay Municipal Boroughs Act. The question whether the Collector can be directed to

Mr. Sanas's seat vacant

does not therefore arise..

14/.... 14/10.

Remembrancer of Legal Affairs.

U.H. to H.C.S.C.O.D., No.9410 Dated 13th October 1946.

Sub-rule (1) of rule 13 of the Ahmedabad Municipal Election, Rules, provides:-

" Every Municipal Election shall to held on such dates between such hours and at such place or places as may be fixed by the Collector. The Collector shall fix the date, hour and the place for the following stages of election, namely-

receipt of nomination papers,
Scrutiny of nomination papers,
Recording of votes, and
Counting of votes.

The date for the receipt of nomination papers shall not be less than twenty-two days before the date fixed for the election. "

It is evident that rule 13(1) empowers the Collector to fix the date, hour and place for the four stages of election

mentioned therein, with this limitation that the date for receipt of nomination papers shall not be less than twenty-two days before the date fixed for the election.

Sub- rule (2) of rule 13 provides that written notice of the dates fixed as aforesaid shall be given and published in English & Gujarati or both as the Collr. may direct not less than thirty days before the date fixed for the election etc. It is important to note that while sub-rule (1) provides for fixation of the date, hour and place for the stages of election by the Collr, sub-rule(2) provides for giving and publishing written notice only about the dates fixed; such written notice shall however be given and published not less x than thirty days before the date fixed for the election. The words " the dates fixed as aforesaid" in sub-rule (2) , contemplate that the written notice given and published as directed by the Collr, should specify the dates fixed in respect of the various stages of election referred to in sub-rule (1). Rule 13(2) specifies the time limit for giving and publishing written notice x in respect of the dates fixed by the Collr,for at the various stages, himself for receipt of nomination papers, (vide rules 14 and 14A), scrutiny of nomination papers (rules 15-18), recording of votes (rules 21 et seq) and scrutiny and counting of votes (rules 40 and 42) and provides that such written notice shall be given and published not less than 30 days before the date fixed for the election, that is the date x fixed for recording of votes. It does not contemplate that the Collr, should have , give a written notice with regard to fixation of place or places for holding the various stages of election and if any such place or places are specified in the notice, the Collr, can change them at any time even within 30 days of the date fixed for election provided that reasonable notice is given of the change. A view seen & refused by the President, Ahmedabad Municipal Borough Concurred x in by the Comm. T.D. is correct.

T.D. to H.E.L.G.D. No.11107 dated 26th November 1948.

Okha of the K.L.H.T.

Question whether the terminal tax rule should be modified and sanctioned or be referred back to the Municipality.

Bombay Municipal Boroughs Act, 1925. Section 76.

A provision for the grant of exemption from the levy of the terminal tax is legally of a different character from provision for the refund of the tax, though ultimately the financial effect may possibly be same. Section 76 of the Bombay Municipal Boroughs Act, 1925 cannot be resorted to by Government for substituting a provision for refund for a provision for exemption. If Government desires that the Municipality should make a rule providing for refund of the terminal tax, it will have to be referred back to the Municipality.

Id/.....3/12.

Remembrancer of Legal Affairs

U.R. to H.S L.C.D., No.11484, dated the 4th December 1948.

DVR.

It appears that the Nadiad Municipality was for over a year without any qualified Chief Officer and the General Board of the Municipality at its meeting called on 20.12.1947 passed amongst others the following two resolutions:

No.367. "The President is authorised to issue an advertisement for appointment of a qualified Chief Officer."

"No.405. '.... This Board is of the opinion that a combined post of a Chief Officer and Engineer should be kept and a post of Chief Officer should be filled by a candidate who has passed the B.E. examination."

In pursuance of the aforesaid resolutions, the President of the Municipality issued an advertisement on 31st December 1947 calling for applications for the post of a Chief Officer from candidates who should be B.E. of the Bombay University or possess equivalent degree of any recognised University. Accordingly certain applications were received and the question of making appointment to the Post of Chief Officer was placed before the General Board Called on 28.2.1948. At that meeting the following resolution was moved:

"Applications for the appointment of a qualified Chief Officer under section 33 of the Act are invited. After the examination of the applications received therefor, this Board resolves that Mr.Vaghjibhai Nagambhai Desai is appointed as Chief Officer with effect from 15.3.1948 or the date from which he is relived as he is serving in the Judicial Department of Government on a monthly salary etc."

This resolution was passed by a majority and accordingly Mr.V.N.Desai, who is merely an a graduate i.e.Vanijya Visharad (B.Com.) of the Gujarath Vidyapith and does not possess any qualification of an Engineer and who was holding a post of Deputy Nazir in the District Court, Nadiad, has been appointed as Chief Officer of the Nadiad Municipality. The question raised for consideration of the D.L.R. is whether his appointment is valid?

It is true that under section 33(1) of the Bombay Municipal Boroughs Act,1925, a person who is a graduate of a recognised University or a qualified Engineer can be appointed as Chief Officer of a Municipality; and Mr. V.N.Desai who is a Commerce graduate of a recognised University is thus eligible for the appointment. But that provision is an enabling provision which gives to the Municipality discretion to appoint a Chief Officer any person who is either a graduate of a recognised University or a qualified Engineer. The resolution 367 and 405 passed by the Nadiad Municipality at the meeting of its General Board on 20. 12. 1947 have to be read together. The qualification contemplated by Resolution No. 367 was laid down in Resolution No.405 . It is apparent from these two resolutions that the Municipality decided to appoint an Engineer as its Chief Officer. This is further affirmed by the advertisement issued by the President calling for applications from candidates who possess the qualifications of an Engineer. Having thus resolved to appoint an Engineer to the Post of a Chief Officer, it was not open to the Municipality to rescind or modify that resolution within three months after the passing thereof i.e.20. 12. 1947 without conforming to the provisions of section 35(12). The proceedings of the meeting called on 28.2.1948 in which Mr. V.N.Desai was appointed as Chief Officer discloses that no

attempt was made to rescind or modify the Resolution No. 405, dated 20.12.1947. Obviously therefore the resolution appointing Mr. V.N.Desai as Chief Officer was in contravention of section 33(12) and his appointment is unlawful. Even otherwise, having called applications from candidates who possessed the qualifications of an Engineer, it was not open to the Municipality to appoint a candidate who did not possess that qualification. Candidates were obviously misled by the insistence in the advertisement upon the Engineering qualification, and it ~~is~~ can be contended that even for purposes of section 33(1) the advertisement was not quite regular and in accordance with spirit of Resolution No.367 The appointment of Mr. V.N.Desai is thus clearly unlawful.

Id/.....22/4.

Remembrancer of Legal Affairs.

Issued
16/19/4.

V.N. to H.and L.G.Department, No.10021, dated 19th November1948.

Please see R.L.A's opinions No.2203 dt.23-2-49 & No.3610 dt.1/4/49.

House Tax Rules.

Bombay Municipal Boroughs Act, 1925.

D.L.A.'s Opinion No. 9688, dated 28th December 1945

D.L.A.'s Opinion No. Munis.Cities-II-10-29, dated 8-7-1929.

By Government Resolution, Health and Local Government Department No.S. 91(37), dated 29th November 1947 Government sanctioned revised rule 4 of the house tax rules of the Jalgaon Municipality. The Khandesh Spinning and Weaving Mills Co. Ltd., Jalgaon represent that this revised rule 4 of the Jalgaon Municipality is ultra vires and request o Govt Government to suspend the levy of the tax under section 152 of the Bombay Municipal Boroughs Act, 1925. H.S L.G.D. states that in the case of Sholapur Municipality the D.L.A. had advised in his Opinion No. 9688, dated 28th December 1945, that the rule was unwarranted and that the Consulting Surveyor to Government had advised that the provision, as in the case of the Amalner Municipality to fix the rental value of mills, factories, etc. at a certain fixed rates on the basis of area and then to levy the assessment on the rental value so fixed at the sanctioned rate was in order and that the Jalgaon rule is based on this rule. It appears that the Amalner Rules were referred to the D.L.A. in his opinion No. Munis. Cities II-10-29, dated 8th July 1929. The Under Secretary, H S.L.G. D. therefore requests the D.L.A. to advise in the matter.

2. Rule 3 of the Amalner House Tax Rules, 1929 provided that all houses and factory premises within the limits of the municipal borough other than those expressly exempted from the payment of the tax by the provisions of these rules shall be assessed according to their rental value and at rates specified in Schedule 'A' thereto annexed. This rule was scrutinised by the D.L.A. and in his opinion No. Munis Cities II -10- 29, dated 8th July 1929 he held that the rules as revised were in order. Rule 4 framed by the Jalgaon Municipality also provides that every built area within factory premises and either used or intended to be used for the working of the factory or for the occupation of its owner or employees shall be assessed according to their rental value and

at rates specified in the Schedule. The rental value of the mill premises etc. will thus be calculated on the basis of the floor area in the manner prescribed in the explanation below the rule and the tax is then actually levied on the rental value so calculated. The assessment is thus not calculated directly on the basis of total floor area only but on the annual rental value of the floor area worked up according to the explanation below Rule 4(a) and hence within the meaning of section 78(d) of the Bombay Municipal Boroughs Act,1925. This rule does not provide for the x levy of a rate on the basis of the area and being in no way inconsistent with R.L.A.'s opinion No.9688, dated 28th December 1945 is in accordance with the Amalner rule which was scrutinised by the R.L.A. and appears to be in order.

Sd/.....

Remembrancer of Legal Affairs.

U.R. to H. & L.G.D. No. 12303 dt 24/12/1948.

DYR.

Bombay Municipal Boroughs Act, 1925.

Office of the Board.

Seen and returned.

2. The view taken by Health and Local Government Department is correct. Section 12(5) of the Bombay Municipal Boroughs Act, 1925, is mandatory and the authority competent to decide in the first instance as to whether a vacancy has occured in the Collector and consequently the President of the Amalner municipality should first approach the Collector and the fact that the Collector held that the nomination of Mr. P.K.Pitkade was valid would not preclude him from deciding under section 12(5) whether a vacancy has occured by reason of Mr. P.K.Pitkade being elected in contravention of section 12(2)(b).

63/.....21/12.

Secretariat of Legal Affairs.

U.O. to H. & L.G.D., No. 12331, dated the 27th December 1948.

DIR.

Local Department.

The Bombay Municipal Boroughs Act, 1925.

Section 200(1).

The view taken by the Commissioner, N.D. , is correct and it does not appear necessary to amend the provisions of section 200(1) of the Bombay Municipal Boroughs Act,1925, extending the time limit of six months a s a prosecution for the continuing offence can be launched within six months from each day on which it continues (see Emperor Vs. Narsondas, 44 Bom. L.R. , 756).

M/[illegible]/12.

Additional Secretary to Government.

U.R. to H.S L.C.D., No.11356 dated the 2nd December 1942.

L.D. R.J. No. 16899 P.Y. 7/12/48.

Under sec. 197(1) of the Criminal Pro. Code, when any public servant who is not removable from his office save by or with the sanction of a Provl. Govt. or some higher authority is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction in the case of a person

person employed in connection with the affairs of a Province of the Governor of that Province. It is no doubt true that Mr. Khopkar being the Chief Officer of the Poona City Municipality would under sec.56(1) of the Bombay Municipal Boroughs Act, 1925, be deemd to be a public servant within the meaning of sec,21 of the Indian Penal Code. But as under sec.33(2) of the Bom. Municipal Boroughs Act, a Chief Officer is removable from office by the Municipality without the sanction of the Provl. Govt. no sanction of the Governor for the prosecution of Mr. Khopkar is necessary under section 197(1) of the Cr. Pro. Code. The view expressed in para 3 of the H. & L.G.D. office note is correct, The papers may be 'Seen and returned'

Id/...
10/12

U.R. to H.& .LG.D. No. 11842 dated 14th December 1948.

DLP